FOR ARGUMENT

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OCTOBER TERM, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

PACIFICA FOUNDATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMICI CURIAE

AMERICAN BROADCASTING COMPANIES, INC.
CBS INC.
NATIONAL ASSOCIATION OF BROADCASTERS
NATIONAL BROADCASTING COMPANY, INC.
NATIONAL RADIO BROADCASTERS ASSOCIATION
PUBLIC BROADCASTING SERVICE
RADIO TELEVISION NEWS DIRECTORS ASSOCIATION
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RADIO TELEVISION NEWS DIRECTORS ASSOCIATION
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

OPINIONS BELOW

The *Memorandum Opinion and Order ("Order")* of the Federal Communications Commission ("Commission") was released on February 21, 1975 and is reported at 56

F.C.C.2d 94 (App. 6).* A *Memorandum Opinion and Order* of the Commission granting in part and denying in part a petition for clarification or reconsideration was released March 23, 1976 and is reported at 59 F.C.C.2d 892 (App. 41) *("Reconsideration")*. The decision of the Court of Appeals for the District of Columbia Circuit in *Pacifica Foundation* v. *FCC*, reversing the Commission's *Order*, was issued March 16, 1977 and is reported at 556 F.2d 9 (App. 45).

QUESTIONS PRESENTED

1. Whether Section 1464 of the Criminal Code, which prohibits the broadcast of "obscene, indecent, or profane" material, should be construed to prohibit the broadcast of materials which are not obscene and are protected under the First Amendment.

2. Whether, in the face of Section 326 of the Communications Act, the Federal Communications Commission may proscribe the broadcast of non-obscene material which is not prohibited by Section 1464 but which the Commission deems "offensive" or "indecent."

INTERESTS OF AMICI CURIAE

This Brief Amicus Curiae is submitted with the consent of the parties by:

American Broadcasting Companies, Inc.
CBS Inc.
National Broadcasting Company, Inc.
National Association of Broadcasters
National Radio Broadcasters Association
Public Broadcasting Service
Radio Television News Directors Association
Reporters Committee for Freedom of the Press

* Citations herein are to the pages of the Commission's Appendix.

American Broadcasting Companies, Inc., CBS Inc., and the National Broadcasting Company, Inc., are the owners of radio and television broadcasting stations and the operators of radio and television broadcasting networks. Amicus Public Broadcasting Service distributes national programming and provides other program-related services to the nation's public television stations. These amici believe that broadcasters should and do exercise good judgment and responsibility in the presentation of potentially offensive material. These amici have a vital interest in the policies of the Commission set forth in the *Order* under consideration here. Their interests as journalists and broadcasters of entertainment, cultural and public affairs programs will be severely affected if the Commission's *Order* is sustained. They believe that granting the Commission the power claimed here would strike at the heart of the First Amendment.

The National Association of Broadcasters ("NAB") is a non-profit, incorporated association of radio and television broadcast stations and networks. As of March 21, 1978, NAB's membership included 2550 AM radio stations, 1924 FM stations, 556 television stations, and the major nationwide commercial broadcast networks. One of NAB's objectives, according to its by-laws, is "to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcast industry to the end that it may best serve the public." Among NAB's primary concerns is maintaining the vitality of the First Amendment guarantee of "freedom of the press." For this reason, NAB is particularly concerned about the Commission's asserted power to censor non-obscene broadcast material.

The National Radio Broadcasters Association is a non-profit organization with a membership of approximately

1000 AM and FM radio broadcast stations throughout the United States. The Association believes that the First Amendment interests of broadcasters and the public should remain free and unfettered in order to permit full development of the aural broadcast medium and its service to the public. The Association appears as amicus in this case because it believes the Commission's *Order*, if left standing, will greatly impair major First Amendment interests.

Radio Television News Directors Association ("RTNDA") includes approximately 1500 members who are active in the supervision, gathering, reporting and editing of news and other information of public affairs broadcast throughout the nation. RTNDA joins in this brief to emphasize the importance of the case in terms of its potential impact upon news and public affairs programs.

The Reporters Committee for Freedom of the Press is a legal research and defense fund devoted to protecting the First Amendment interests of the news media and the public. The Committee appears as amicus in this case because it firmly believes that the Commission's *Order*, if upheld, will abridge the public's right to be informed and seriously restrict the right of the press to carry out its traditional role of informing the public of news of political, social and cultural importance.

STATEMENT

Respondent Pacifica Foundation is a non-profit corporation organized under the laws of California. It is the licensee of six radio stations: KPFA (FM) and KPFB (FM), Berkeley, California; KPFK (FM), Los Angeles, California; KPFT (FM), Houston, Texas; WBAI (FM), New York, New York; WPFW (FM), Washington, D.C. These stations are supported by voluntary annual listener subscriptions and foundation grants. There is no commercial advertising. The Pacifica stations are generally recognized in the industry as presenting specialized programming of interest to a relatively highly educated audience.[1] Although Pacifica's programming has at times been controversial and has before been made the subject of Commission inquiry,[2]

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[1] As stated in its Articles of Incorporation, Pacifica's broadcasting purpose is:

> "(c) . . . to encourage and provide outlets for the creative skills and energies of the community; to conduct classes and workshops in the writing and producing of drama; to establish awards and scholarships for creative writing; to offer performance facilities to amateur instrumentalists, choral groups, orchestral groups and music students; and to promote and aid other creative activities which will serve the cultural welfare of the community.
>
> "(d) . . . to engage in any activity that shall contribute to a lasting understanding between nations and between the individuals of all nations, races, creeds and colors; to gather and disseminate information on the causes of conflict between any and all of such groups; and through any and all means compatible with the purpose of this Corporation, to promote the study of political and economic problems and of the causes of religious, philosophical and racial antagonisms.
>
> "(e) . . . to promote the full distribution of public information; to obtain access to sources of news not commonly brought together in the same medium; and to employ such varied sources in the public presentation of accurate, objective, comprehensive news on all matters vitally affecting the community."

[2] In one inquiry, for example, the Commission considered complaints from listeners directed at broadcasts of poems authored and

Pacifica "licenses have been granted and renewed with attendant public interest findings over the years." [3]

At 2:00 p.m. on a Tuesday afternoon, October 30, 1973, Pacifica's New York station, WBAI (FM), broadcast its regularly scheduled live program, "Lunchpail," a discussion program which generally treats matters of public interest (App. 8-9). "Lunchpail" is the type of program that would be classified as public affairs by most commercial broadcast stations. During the October 30, 1973, program, the host discussed and analyzed society's use of language (App. 9). No recording was made of the broadcast, and the precise nature of the discussion is not reflected in the record (App. 11). However, it appears that in the course of the program, the host played a monologue from a record album recorded by George Carlin (App. 9),[4] a comedian of considerable stature in his profession, whose routines, like the one here, often satirize American manners and language. The Carlin album, including the

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read by Lawrence Ferlinghetti, Edward Albee's "Zoo Story," and a panel discussion by eight homosexuals discussing their attitudes and problems. *Pacifica Foundation*, 36 F.C.C. 147 (1964). Complainants had objected to the materials as "offensive" and "filthy." *Id.* at 148. The Commission found, however, that the broadcast of limited portions of the Ferlinghetti poems was contrary to Pacifica's own program standards and occurred inadvertently. The Commission found, moreover, that the panel discussion and the "Zoo Story" broadcasts were "well within the licensee's judgment under the public interest standard," *id.* at 148, noting that "the licensee's judgment in this freedom-of-speech area is entitled to very great weight and that the Commission, under the public-interest standard, will take action against the licensee . . . only where the facts of the particular case, established in a hearing record, flagrantly call for such action." *Id.* at 150-51.

[3] *Pacifica Foundation*, 43 F.C.C.2d 1193, 1195 (1973) (Comm'r Hooks concurring in part and dissenting in part).

[4] George Carlin, "Occupation: FOOLE," cut 5, side 2 (Little David Records, LD 1005). Verbatim transcripts of the monologue appear in the Commission's *Order*, *supra*, 56 F.C.C.2d at 100-02 (App. 19-24), and in the court of appeals' opinion, 556 F.2d at 37-40 (App. 109-14).

monologue involved here, is apparently available in record stores throughout the country.

Immediately prior to the broadcast of the monologue, listeners were carefully advised that it contained language which might be regarded by some as offensive (App. 9-10). It was suggested that anyone who felt he might be offended should change stations and return to WBAI after 15 minutes. The monologue, entitled "Filthy Words," was then broadcast. During the monologue's twelve minutes, George Carlin humorously discussed society's use of and attitude toward the words which the Commission here claims are indecent. In the course of the monologue, the words themselves were used frequently with examples of the various shades of meaning to which these words have been subjected. There is no evidence in the record that the station advertised in advance that it would broadcast this monologue or that the station sought to attract listeners who would not otherwise have listened to the broadcast. The Commission found that the broadcast did not have a prurient appeal. *See Order*, *supra*, 56 F.C.C.2d at 98-99 (App. 14-17).

Only one complaint was received about the broadcast. It was made by a man who heard the broadcast while driving in a car with his young son, whom he allowed to listen to the broadcast (App. 8). The record does not reveal whether the complainant heard the warning preceding the monologue's broadcast; nor does it reveal why, after hearing the initial portion of the broadcast, the complainant did not turn off his radio or change to another station.

The Commission forwarded the lone complaint which it received to WBAI with a request for comments, and WBAI replied, describing the nature of the broadcast, the monologue's relation to the broadcast, and the nature of the monologue and its artist (App. 3-4). WBAI's response noted that Carlin's monologue "shows us that

words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words" (App. 4). No other comments were received.

On February 21, 1975, the Commission released its *Order* "pursuant to" Section 1464 of the Criminal Code, 18 U.S.C. § 1464, which prohibits the utterance "by means of radio communications" of "any obscene, indecent or profane language." [5] The Commission did not find that the broadcast was obscene,[6] and indeed conceded that such a finding could not have been supported. *See Order*, *supra*, 56 F.C.C.2d at 97-98 (App. 14-17). Instead the Commission found that the broadcast was prohibited because it was "indecent," without regard to the broadcast's literary, artistic, or intellectual merit. The Commission gave four reasons in its *Order* justifying regulation of the broadcast of "indecent" material: (1) children in many cases have unsupervised access to radios, (2) radio receivers are in the home, (3) unconsenting adults may inadvertently tune into offensive broadcasts, and (4) scarcity of spectrum space requires licensing in the public interest. *Id.* at 97 (App. 13).

The Commission defined as "indecent" the broadcast of "language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." *Id.* at 98 (App. 15). Such language, which the Commission also described as "[o]bnoxious, gutter language," *id.*, was held to be prohibited even if it lacks

[5] 56 F.C.C.2d at 99 (App. 18). The Commission also stated that its *Order* was issued "in furtherance of [its] statutory obligation to promote the larger and more effective use of radio in the public interest," citing 47 U.S.C. § 303(g). 56 F.C.C.2d at 99 (App. 18).

[6] The *Order* stated that it "[did] not deal with the somewhat different problem of 'obscene' language." *Id.* at 94-95 (App. 8).

appeal to the prurient interest. Finding that such language "[has] no place on radio . . . when children are in the audience," *id.*, the Commission stated that the particular broadcast was prohibited because the words were broadcast "at a time when children were undoubtedly in the audience (i.e., in the early afternoon)." *Id.* at 99 (App. 17). The Commission suggested that a different standard allowing for consideration of the intellectual value of the program "might conceivably" be used "[w]hen the number of children in the audience is reduced to a minimum," such as "during the late evening hours." *Id.* at 98 (App. 15-16).

There was no evidence in the record as to how many children, other than the complainant's son, listened to the broadcast; whether WBAI broadcast any programming at all directed to or attractive to children; or whether children listened to this FM station in any significant numbers. The Commission also did not consider whether early afternoon on a schoolday was a time when the number of children in the FM audience generally might have been reduced to a minimum, perhaps even below the number of children listening in the late evening hours.[7]

[7] Indeed, research suggests that other than between the hours of 12:00 a.m. and 6:00 a.m., when listening by all age groups is minimal, child audiences are at a minimum during the period including the 2:00 p.m. weekday time when the Carlin monologue was broadcast:

*Average-Quarter-Hour Persons 12-17 Using Radio Nationwide**

Day-Part	Monday-Friday (000)	%	Saturday (000)	%	Sunday (000)	%
6-10 AM	4,243	17.8	2,978	12.5	2,339	9.8
10 AM-3 PM	2,245	9.4	5,309	22.2	4,696	19.7
3-7 PM	5,236	21.9	4,453	18.6	4,394	18.4
7 PM-12 AM	4,178	17.5	3,811	16.0	3,440	14.4
12-6 AM	667	2.8	893	3.7	840	3.5

* Total number of persons 12-17 is 23,890,000. Data for children 2-11 is not compiled. Source: Statistical Research, Inc., RADAR 16 (Spring/Fall 1977).

Nor was there any evidence in the record that material such as that contained in the Carlin monologue was harmful to children.

The Commission declined to impose any sanction on WBAI, and issued only a declaratory order.[8] A declaratory order was used, according to the Commission, because it was a "flexible procedural device admirably suited . . . to clarify the standards which the Commission utilizes to judge 'indecent language'." *Id.* at 99 (App. 17).

Commissioner Reid issued a concurring statement maintaining that the language involved would "be totally inappropriate for broadcast at any time" but noting that the broadcasts which were the subject of the *Order* had been "engaged in by only a few careless broadcasters." *Id.* at 102 (App. 24). Commissioner Quello, in a concurring statement, rejected the majority's "view that such words are less offensive when children are at a minimum in the audience," asserting that "under no stretch of the imagination . . . [could] such words [be] broadcast in the context of serious literary, artistic, political or scientific value." *Id.* at 103 (App. 25-26).

Commissioner Robinson, in a concurring statement joined by Commissioner Hooks, accepted the principle that "indecent" programming may be proscribed, but noted that "absolutely crucial to my concurrence is the limited context in which this principle operates." *Id.* at 107 (App. 34). He emphasized the time at which the Carlin monologue was broadcast, stating that he would find the monologue had sufficient literary value to avoid being "indecent" if broadcast at a different hour, *id.* at 108 n.9

[8] Nevertheless, the Commission pointedly noted that "this order will be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." *Id.* at 99 (App. 17).

(App. 36 n.9), and noting the "need for caution" lest in protecting children "we also undertake to regulate the tastes of adults." *Id.* at 109 (App. 39).

Amicus RTNDA petitioned the Commission for reconsideration and clarification, seeking a ruling "to the effect that the Commission 'does not intend to apply its definition of indecent language so as to prohibit the broadcasting of indecent words which might otherwise be reported as part of a bona fide news or public affairs program'." *Reconsideration, supra*, 59 F.C.C 2d at 892 (App. 42).[9] In addressing the Petition For Reconsideration, the Commission noted that its declaratory order "was issued in a specific factual context" and pointed to its "long standing policy of refusing to issue interpretive rulings or advisory opinions when the critical facts are not explicitly stated," *id.* at 893 (App. 43-44). The Commission then denied RTNDA's petition, except to observe that when the broadcaster covers live events, the broadcaster would not be held responsible for indecent language. The Commission, however, qualified this limited clarification by providing that it applied only where the broadcaster "exercise[s] judgment, responsibility, and sensitivity to the community's needs, interests and tastes." *Id.* at 893 n.1 (App. 43 n.1).

Pacifica Foundation petitioned for review of the Commission's *Order* in the United States Court of Appeals for the District of Columbia Circuit. On March 16, 1977,

[9] RTNDA's petition before the Commission comprehensively described the nature of the material whose broadcast would be precluded by the Commission's *Order* and gave as an example the so-called "White House tapes." The Commission is, therefore, in error in asserting before this Court that it never had the opportunity to consider such materials as those relied on by Pacifica in the court of appeals below. (Br. at 21 & n.21, 43-44.) Nor could the Commission, in any event, defend a sweepingly phrased declaratory ruling on the ground that it did not know how words such as those at issue are used or that it did not know the types of literary works containing them.

the District of Columbia Circuit reversed the Commission. *Pacifica Foundation* v. *F.C.C.*, 556 F.2d 9 (App. 45). In the opinion announcing the court's judgment, Judge Tamm found that despite "Commission claims that its *Order* does not censor indecent language but rather channels it to certain times of the day[, i]n fact the *Order* is censorship . . . ." *Id.* at 13 (App. 53). According to Judge Tamm, the Commission had ruled that "[a]s long as such large numbers of children are in the audience the seven words noted in the *Order* may not be broadcast." *Id.* at 14 (App. 53). He further found that the Commission's action "proscribes the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the Bible." *Id.* (App. 54). Judge Tamm therefore concluded that every use of the words proscribed by the Commission's *Order* could not be prohibited, even as to minors, and found that the *Order* was impermissibly overbroad. Judge Tamm also held that the Commission's failure to define children in its *Order* rendered it impermissibly vague. Although he found that the language proscribed by the Commission was not obscene under *Miller* v. *California*, 413 U.S. 15 (1973), and therefore, protected by the First Amendment, he declined to consider whether Section 1464 or the Criminal Code permits the Commission to regulate protected speech at all, and if so, whether that section is unconstitutional.

Judge Bazelon, in a concurring opinion, found that the Commission's *Order* violated the First Amendment. He concluded that the speech that the Commission labelled as "indecent" would be protected by the Constitution in other media and that nothing about the character of broadcasting justified a different treatment. Judge Leventhal, in a dissenting opinion, would have upheld the Commission's *Order* on the sole ground that it

was justified by the "compelling state interest" in the protection of children. *Id.* at 37 (App. 107).

The Commission's petition for a writ of certiorari to this Court followed, and certiorari was granted on January 9, 1978. In this Court, the Commission is not supported by the United States, which was a statutory respondent in the court of appeals.[10]

SUMMARY OF ARGUMENT

Invoking the prohibition against "obscene, indecent, or profane" broadcasts contained in Section 1464 of the Criminal Code, 18 U.S.C. § 1464, the Commission claims the authority to prevent the broadcast of material which is not obscene and which is protected by the First Amendment on the ground that it is "patently offensive as measured by contemporary community standards for the broadcast medium." The Commission does not and cannot point to any widespread use of "offensive" material in the broadcast media, and the broadcast industry clearly has demonstrated responsibility and good judgment in its treatment of such material.

Although the Commission has only proscribed here the broadcast of a comic monologue discussing society's use of and attitude toward "dirty words," the authority it has asserted would clearly extend much further. If successful here, the Commission would be placed in the position of a censor, free to forbid whatever is objectionable to "the most vocal and powerful of orthodoxies." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 505 (1952). Neither Section 1464 nor anything in the Communications Act gives the Commission that power.

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[10] 28 U.S.C. § 2348.

The Commission has no such authority by virtue of its power to regulate broadcasting in the "public interest." *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954). Section 326 of the Communications Act provides that "nothing" in the Act (including the public interest provisions) shall be construed to authorize censorship or interference with freedom of speech. This limitation on the Commission's power to utilize the public interest standard to censor particular programs is clearly confirmed by the Act's legislative history.

While Section 1464 was designed as a statutory exception to the prohibition on censorship, it only bars obscene broadcasts, and it does not give the Commission the authority to prohibit non-obscene material. This Court has construed the prohibition of "obscene" and "indecent" materials in statutes similar to Section 1464 (18 U.S.C. §§ 1461, 1462) as limited to obscenity. *Hamling* v. *United States*, 418 U.S. 87 (1974); *United States* v. *12 200-Ft. Reels of Super 8 mm. Film*, 413 U.S. 123 (1937); *Roth* v. *United States*, 354 U.S. 476 (1957). Nothing in the legislative history suggests that Section 1464 should be construed differently.

Moreover, Section 1464 should be construed as limited to prohibiting obscenity in order to avoid serious constitutional questions. The statutory standard of "indecent" contained in Section 1464 has no commonly accepted meaning. It does not, therefore, satisfy First Amendment requirements of definiteness. *Interstate Circuit* v. *Dallas*, 390 U.S. 676 (1968). The danger to First Amendment interests is evident from the widely varying constructions the Commission has given the term "indecent" over the years and from the broad and indefinite sweep of its *Order* in this case.

The Commission's *Order* also raises substantial constitutional questions apart from considerations of vagueness.

It is highly doubtful that the broadcast of non-obscene material may be prohibited for the reasons advanced by the Commission—spectrum scarcity, preventing intrusions on privacy, and protecting children. Spectrum scarcity warrants only very limited restraints on the First Amendment's protection of broadcaster editorial discretion, and then only to assure adequate representation of varying viewpoints on public issues. This Court's decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 396 (1969), specifically noted that that case involved "no question . . . of the Commission's refusal to permit the broadcaster to carry a particular program" and that such a restriction "would raise more serious First Amendment issues."

Protecting individual privacy from intrusion also does not justify restraints on programming since the individual may readily avoid any intrusion he finds objectionable by simply turning the radio or television dial. *Cohen* v. *California*, 403 U.S. 15 (1971); *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970).

Finally, the need to protect children cannot support the breadth of the prohibitions the Commission would impose here. Relegating broadcasts that the Commission considers "offensive" to times when child audiences are minimal would, because of work or sleeping habits, prevent adults from receiving a wide variety of programming, including contemporary plays, candid discussions of public affairs and complete and accurate news reporting. In protecting children, the Commission may not impair the rights of the adult population. *Butler* v. *Michigan*, 352 U.S. 380 (1957). Moreover, children cannot be prevented from hearing allegedly "indecent" words without any regard to the intellectual merit of the program in which they are used. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Cohen* v. *California*, *supra*.

ARGUMENT

INTRODUCTION

Although the facts of this case focus on a particular broadcast, the importance of this case is far greater. On the complaint of a single listener, the Commission—purporting to be guided by its own sense of contemporary community standards as to what is "patently offensive" and explicitly declining to consider literary, artistic, or intellectual merit as even relevant to the broadcast before it—banned the use of certain language on the airwaves. In so doing, the Commission has applied to the broadcast medium a standard which was rejected more than 40 years ago for the printed press. *See United States* v. *One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934).

Even before the Commission's *Order*, the Commission received thousands of complaints claiming that particular broadcasts were offensive to community standards of decency and seeking to invoke the Commission as an instrument of censorship.[11] These complaints condemn, and would have the Commission purge from the air, programs which in the judgment of the complainant lack " 'due regard for sensitivity, intelligence and taste.' " *Oliver R. Grace*, 22 F.C.C.2d 667, 667 (1970). Complaints have been received ranging from condemnation of ethnic jokes,[12] to disapproval of panel discussions by homosexuals,[13] to objection to the discussion of abortion on an entertainment series.[14] If the Court ultimately upholds the

[11] *See Report on the Broadcast of Violent, Indecent and Obscene Material*, 51 F.C.C.2d 418, 418-19 (1975). *See also Order, supra*, 56 F.C.C.2d at 94 (App. 6).

[12] *Anti-Defamation Comm'n of the Polish American Congress*, 46 F.C.C.2d 124 (1974), *aff'd sub nom. Polish American Congress* v. *FCC*, 520 F.2d 1248 (7th Cir. 1975).

[13] *Pacifica Foundation*, 36 F.C.C. 147 (1964).

[14] *Diocesan Union*, 41 F.C.C.2d 297 (1973).

Commission's *Order*, the Commission will undoubtedly receive many more complaints of this nature.

At the heart of this case, therefore, is a question not of word usage but of Commission authority to act as a censor of the airwaves "set adrift upon a boundless sea amid a myriad of conflicting currents of [taste], with no charts but those provided by the most vocal and powerful of orthodoxies." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504-05 (1952).

The dangers to broadcasting which would result from sustaining Commission authority to regulate speech which might be found offensive are evidenced by the course the Commission's regulation has taken over the past few decades. During that period, the Commission has travelled its own freewheeling journey. In the name of the public interest, it reprimanded broadcasters for the broadcast of songs which were "vulgar and subject to double meaning"[15] and for programming containing language which was " 'coarse, vulgar, suggestive, and susceptible of indecent, double meaning'."[16] Then, reversing course, it stated that "it is not a matter of the Commission trying to rule off the airwaves the coarse or vulgar."[17]

In this case, under Section 1464, the Commission banned as "indecent" material that "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." *See Order, supra*, 56 F.C.C.2d at 98 (App. 16). In an earlier decision, the Commission suggested that it could more broadly prohibit material

[15] *WREC Broadcasting Serv.*, 19 F.C.C. 1082, 1113 (1955).

[16] *Palmetto Broadcasting Co.*, 33 F.C.C. 250, 255 (1962), *aff'd sub nom. Robinson* v. *FCC*, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964).

[17] *Sonderling Broadcasting Corp.*, 27 R.R.2d 285, 288, *recon. denied*, 41 F.C.C.2d 777 (1973), *aff'd sub nom. Illinois Citizens Comm. for Broadcasting* v. *FCC*, 515 F.2d 397 (D.C. Cir. 1975).

merely "patently offensive by contemporary community standards." [18]

The Commission's *Order* here suggested that if children are in the audience in more than "minimal" numbers, the material may not be broadcast even if it has "serious literary, artistic, political or scientific value." [19] Indeed, the *Order* here appears to go so far as to prohibit any consideration of intellectual merit, for it only suggests that such merit "might conceivably" be considered when child audiences are minimal but otherwise states "indecent" broadcasts cannot be redeemed by intellectual merit when children "may be" in the audience.[20] In an earlier decision, the Commission required indecent material to be "utterly without redeeming value," regardless of the size of the child audience, before it could be banned.[21]

Quite evidently the Commission has had its own substantial difficulties in defining the scope of the prohibition of "indecent" material. Not surprisingly, the Commission urges that its standards may change again. Despite assertions in its *Order* that it was attempting to clarify the standards for "indecent," the Commission now argues before this Court that it is free in the future to modify or extend its standards or even to decide not to apply them. (Br. at 43.)

While the Commission suggests that action is necessary to protect the public from the "widespread use of indecent

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[18] *Eastern Educational Radio (WUHY-FM)*, 24 F.C.C.2d 408, 410 (1970).

[19] *See Order, supra*, 56 F.C.C.2d at 98 (App. 15-16).

[20] *See id.* (App. 15). "Surveys have indicated that some children will be viewing television during all hours of the broadcasting day . . . ." *Report on the Broadcast of Violent, Indecent and Obscene Material*, 51 F.C.C.2d 418, 423 (1975).

[21] *Eastern Educational Radio (WUHY-FM)*, 24 F.C.C.2d 408, 414 (1970).

language," *Order, supra*, 56 F.C.C.2d at 100 (App. 18), neither in its *Order* nor in its Brief in this Court does the Commission point to any widespread practice or problem in this area.[22] Nor is there any reason to believe that the decision of the court of appeals setting aside the Commission's *Order* has led, or will lead, to any such result given other constraints.

The Commission can and does prohibit broadcasts that are obscene. *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F.2d 397 (D.C. Cir. 1975). Under this power, the Commission can deal with broadcasts such as the example cited by the Commission in its Brief as illustrating the necessity for a broad power to deal with "indecency." (Br. at 28 n.23.) As the Commission alleged in its Apparent Notice of Liability for forfeiture with respect to that broadcast (Petition for Certiorari, Addendum p. 10a), but failed to note in its Brief here, the objectionable material contained in the broadcast would likely be considered obscene under this Court's decision in *Miller* v. *California*, 413 U.S. 15 (1973).

Moreover, mindful of their own responsibilities, broadcasters have exercised considerable restraint with respect to programming which the community might view as patently offensive. As the Commission has frequently recognized, the self-regulatory efforts of broadcasters play a substantial role in assuring that a responsible approach is taken in this area.

With respect to children's programming, for example, the Commission has tempered its regulation in deference to its belief in the broadcast industry's "willingness to

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[22] The Commission's *Order* identifies only one instance in which it has finally determined that material broadcast was obscene. *See Order, supra*, 56 F.C.C.2d at 94 (App. 7), citing, *Sonderling Broadcasting Corp.*, 27 R.R.2d 285, *recon. denied*, 41 F.C.C.2d 777 (1973), *aff'd sub nom. Illinois Citizens Comm. for Broadcasting* v. *FCC*, 515 F.2d 397 (D.C. Cir. 1975).

regulate itself." [23] Similarly, the Commission has noted with approval the Television Code of the NAB, which since 1952, has encouraged high standards of responsibility in programming.[24] The NAB has a similar code for radio.[25] In addition to the television and radio codes, broadcasters have their own internal policies and practices aimed at dealing with sexually-oriented programming on television.

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[23] *Report and Policy Statement re Children's Programming*, 50 F.C.C.2d 1, 13 (1974), *aff'd sub nom. Action for Children's Television* v. *FCC*, 564 F.2d 458 (D.C. Cir. 1977).

[24] *Report on the Broadcast of Violent, Indecent and Obscene Material*, 51 F.C.C.2d 418, 424 (1975). The guidelines of the Television Code provide in part as follows:

"II. Responsibility Toward Children

* * * *

"Because children are allowed to watch programs designed primarily for adults, broadcasters should take this practice into account in the presentation of material in such programs when children may constitute a substantial segment of the audience.

* * * *

"IV. Special Program Standards

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"8. Obscene, indecent or profane matter, as proscribed by law, is unacceptable.

"9. The presentation of marriage, the family and similar important human relationships, and material with sexual connotations, shall not be treated exploitatively or irresponsibly, but with sensitivity. Costuming and movements of all performers shall be handled in a similar fashion." NAB Television Code.

[25] The Radio Code provides in part as follows:

"I. Program Standards

* * * *

"H. Responsibility Toward Children

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"7. [Programming] should present such subjects as violence and sex without undue emphasis and only as required by plot development or character delineation." NAB Radio Code.

Another factor which acts to inhibit the broadcast of material which some might find offensive was discussed by the court of appeals in its opinion below. As the court noted, there are strong economic incentives deterring broadcasters from broadcasting excessive quantities of material which some members of the public might find objectionable. The court observed:

> "Licensees are businesses and depend on advertising revenues for survival. The corporate profit motive and the connection between advertising revenue and audience size suggest that the dike will hold as long as the community remains actually offended by what it sees or hears. Commentators and commissioners alike have noted that broadcast media require majorities, or at least sizeable pluralities, to pay the bills. If they are correct, and if the Commission truly seeks only to enforce community standards, the market should limit the filth accordingly." 556 F.2d at 18 (App. 63-64) (footnotes omitted).

These economic constraints also operate on noncommercial broadcasters which depend on family and corporate contributions, as well as tax dollars, for their survival.

As a result of these and other self-regulatory efforts, there has been nothing approaching the widespread use of obscene or "indecent" material feared by the Commission.[26]

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[26] The self-regulatory efforts of broadcasters have been sufficiently effective that they have led to charges of "censorship" by writers and producers. *See, e.g., Writers Guild* v. *FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976), *appeal pending sub nom. Writers Guild* v. *American Broadcasting Co.*, No. 77-1058 (9th Cir. filed November 15, 1976) (action by various directors, actors, writers, and producers of television programs against television networks, National Association of Broadcasters and the Commission challenging adop-

These regulatory and self-regulatory restraints would exist whether or not the Commission is held to have the power to prohibit the broadcast of material which is not obscene. There is, therefore, little ground for fearing that denial of such power to the Commission would change the nature of the broadcasting industry. Unfortunately, if the Commission's *Order* is ultimately sustained, there is also little question that the Commission's roving efforts to regulate "indecency" will injure broadcast journalism and substantially limit other responsible programming. RTNDA's petition for reconsideration or clarification of the Commission's *Order*, for example, evidences the *Order*'s great potential for suppressing legitimate news and public affairs broadcasts. The Commission's refusal on reconsideration to address the problems for broadcast journalism raised by its *Order* and its requirement that even live news coverage be "sensitiv[e] to the community's . . . tastes" [27] only intensify the concerns under which broadcasters must labor after the Commission's *Order*.

Moreover, the Commission's *Order* will not just ban seven words from the airwaves. In claiming a general power to determine what is "patently offensive" to accepted standards of decency, the Commission has asserted a power generally to act as censor and to bar material that is not obscene and that has considerable literary,

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tion of so-called family viewing policy); *Smothers* v. *Columbia Broadcasting System, Inc.*, 351 F. Supp. 622 (C.D. Cal. 1972) (action by television entertainers against television network alleging abridgement of First Amendment rights resulting from network's alleged decisions to delete programming material which it deemed offensive). The family viewing policy at issue in *Writers Guild* refers to amendments to the NAB Television Code limiting the broadcast of violent and sexually-oriented programming in the early evening hours.

[27] *Reconsideration, supra*, 59 F.C.C.2d at 893 n.1 (App. 43 n.1).

artistic and intellectual merit.[28] This power of censorship is clearly denied to the Commission by the First Amendment and Section 326 of the Communications Act, 47 U.S.C. § 326, and, indeed, is contrary to the whole structure of congressional regulation of broadcasting, for as this Court has noted, "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 110 (1973).

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[28] As this Court observed in *Winters* v. *New York*, 333 U.S. 507, 510 (1948): "What is one man's amusement, teaches another's doctrine." It is therefore, not surprising, though perhaps ironic, that George Carlin's monologue, the very subject of this controversy, addresses, albeit in the form of entertainment, issues which underlay this controversy.

I. THE FEDERAL COMMUNICATIONS COMMISSION MAY NOT BAR THE BROADCAST OF MATERIAL WHICH IT DEEMS TO BE INDECENT OR OFFENSIVE UNLESS THE BROADCASTING OF SUCH MATERIAL IS PROHIBITED BY SECTION 1464 OF THE CRIMINAL CODE.

In its *Order*, the Commission suggests that its power to regulate offensive programming derives not only from Section 1464 but also from its obligation under Section 303(g) of the Communications Act, 47 U.S.C. § 303(g), to promote the larger and more effective use of radio in the public interest. *Order*, *supra*, 56 F.C.C.2d at 99 (App. 18). Any contention that Section 303(g) enables the Commission to go beyond Section 1464 is at odds with the Communications Act as construed by this Court, with its legislative history and with constitutional prerequisites for agency regulation under the First Amendment.

A similar question came before this Court in *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954). There the Commission ruled that certain "give-away" programs constituted unlawful lotteries under Section 1304 of the Criminal Code. *Id.* at 286-87. In such programs, home listeners, selected wholly or in part on the basis of chance, receive prizes as awards for correctly solving a given problem or answering a question. On review it was argued that listening to the broadcast did not supply the necessary consideration for there to be a lottery, and that the programs were therefore not unlawful under Section 1304.

Although there was no statute specifically authorizing the Commission to enforce Section 1304, the Court noted that the Commission could issue regulations to implement Section 1304 because the " 'public interest, convenience, or necessity' standard for the issuance of licenses would

seem to imply a requirement that the applicant be law-abiding." 347 U.S. at 290 n.7. The Court, however, rejected the notion that the Commission was free to define lotteries and similar schemes independent of the reach of Section 1304, stating:

> "*the Commission's power in this respect is limited by the scope of the statute. Unless the 'give-away' programs involved here are illegal under § 1304, the Commission cannot employ the statute to make them so by agency action.* Thus, reduced to its simplest terms, the issue before us is whether this type of program constitutes a 'lottery, gift enterprise, or similar scheme' proscribed by § 1304." 347 U.S. at 290 (Emphasis added.)

The Court went on to hold that give-away programs were not in violation of Section 1304 and accordingly concluded that the Commission had exceeded its jurisdiction. 347 U.S. at 296.

Here, just as in *American Broadcasting*, the Commission may not reach beyond the prohibitions in the Criminal Code. Indeed this is a far stronger case than *American Broadcasting* for finding such a limitation in the Criminal Code provision. Section 326 of the Communications Act specifically denies the Commission "the power of censorship" and provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326. Section 326, when originally enacted as Section 29 of the Radio Act of 1927,[29] was intended to memorialize the congressional belief that nothing in the Radio Act, which included provision for licensing in the public interest, gave

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[29] Pub. L. No. 632, ch. 169, § 29, 44 Stat. 1172-73 (1927).

the Commission the power of censorship.[30] The legislative history indicates that Congress clearly viewed the prohibition of particular programs as censorship [31] and believed that the authority conferred in the Act to license in the "public interest" gave "[n]o power at all" to proscribe particular programs.[32] The only exception to the prohibi-

[30] Stephen B. Davis, Jr., Solicitor of the Department of Commerce, who was intimately familiar with the drafting of the Radio Act, stated in Senate hearings on the Act:

> "Frankly, I don't think there is anything in the act which would give the power of censorship. I fully agree that there should be nothing to give the Secretary the power of censorship, and it is perhaps wise to give this formal declaration of that policy. Anyway, that is the purpose of this section." *Hearings on S. 1 and S. 1754 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. 121 (1926).

[31] For example, in response to a charge that the Senate bill authorized censorship of anything but religious programs, Senator Dill, a principal architect of the legislation, stated during Senate debate that the bill expressly prohibited Commission censorship of any kind of program. 67 Cong. Rec. 12615 (1926).

Similarly, Congressman Scott, leader of the House conferees, defended the bill against complaints that it did not go far enough in regulating broadcasters, saying:

> "Yes; and you are trespassing very closely on sacred ground when you attempt to control the right of free speech. It has become axiomatic to allow the freedom of the press, and when Congress attempts by indirection to coerce and place a supervision over the right of a man to say from a radio station what he believes to be just and proper, I think Congress is trespassing upon a very sacred principle." 68 Cong. Rec. 2567 (1927).

See also Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine & Fisheries, 69th Cong., 1st Sess. 40 (1926) (remarks of Congressman White, co-author of the Radio Act of 1927, noting that provisions prohibiting obscenity had not been included in House bill in order to avoid charges of censorship).

[32] 67 Cong. Rec. 5480 (1926) (remarks by Congressman White, draftsman of the House bill, during House debates). *See also Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 26 (1926). The decision of the district court in *American Broadcasting* held that if Commission provisions went beyond Section 1364, they would "be considered a form of 'censorship.'" *American Broadcasting Co.* v. *United States*, 110 F.Supp. 374, 389 (S.D.N.Y. 1953).

tions of Section 326 was what was then contained in the last sentence of Section 29 [33] and later became part of Section 326 before ultimately becoming Section 1464. Even the Commission concedes that Section 326 is a specific limitation on its authority (*see* Br. at 5, 8) and apparently recognizes that Section 1464 provides the only statutory exception.

Moreover, constitutional considerations strongly disfavor construction of the Communications Act to authorize the Commission to bar "offensive" programs under the so-called "public interest" standard. This Court has established that an administrative agency cannot prohibit speech under a statute which provides no definite standard.[34] Without some adequate statutory standard, there exists the impermissible risk that licensing will become "the instrument of arbitrary suppression." *Hague* v. *CIO*, 307 U.S. 496, 516 (1939).

The "public interest" standard hardly supplies the necessary guidance. The First Amendment requirement of definite standards will not tolerate Commission efforts "to scan the airwaves for offensive material with no more discriminating a lens than the 'public interest.'" *Banzhaf* v. *FCC*, 405 F.2d 1082, 1099 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969).[35] It follows that, if the Commission has any

[33] "No person within the jurisdiction of the United States shall utter any obscene, indecent or profane language by means of radio communication." Pub. L. No. 632, ch. 169, § 29, 44 Stat. 1172-73 (1927).

[34] *See Interstate Circuit* v. *Dallas*, 390 U.S. 676, 684 (1968); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504-05 (1952); *Schneider* v. *State*, 308 U.S. 147 (1939); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Lovell* v. *Griffin*, 303 U.S. 444 (1938).

[35] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 379-85 (1969), which held that the Commission's authority to implement its fairness doctrine derived from Commission authority to license in the public interest, is not to the contrary. In *Red Lion*, there was an extensive background of legislative history indicating congressional

authority to regulate the broadcast of material which is not obscene, that authority must reside in Section 1464.[36]

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ratification of the fairness doctrine. This Court found in *Red Lion* that legislative history "vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard." *Id.* at 380. In *Red Lion*, moreover, the court noted specifically:

> "There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; . . . of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues." *Id.* at 396.

[36] The district court's decision in *American Broadcasting* identifies the constitutional problems presented here if the Commission's authority extends beyond Section 1464. There, with respect to Section 1304, the district court held:

> "[I]n so far as some of [the Commission's] provisions . . . go beyond the scope of Section 1304 . . ., they may be considered as a form of 'censorship' and to that extent they would be in violation of the First Amendment." *American Broadcasting Co.* v. *United States*, 110 F.Supp. 374, 389 (S.D.N.Y. 1953).

II. SECTION 1464 DOES NOT GRANT THE COMMISSION POWER TO REGULATE OFFENSIVE BUT NON-OBSCENE BROADCASTS.

A. "Indecent" and "Obscene" Have the Same Meaning in Section 1464.

Section 1464 of the Criminal Code provides:

> "whoever utters any obscene, indecent or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years, or both."

Although the Commission has been given the authority to enforce the prohibitions of Section 1464 by civil sanctions,[37] Section 1464 is, of course, a criminal statute. As such, it must be strictly construed. In this regard, the observations of this Court in *American Broadcasting* are precisely in point:

> "It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice." 347 U.S. at 296.

This requirement of strict construction is even more rigid where, as here, the statute impinges on activities protected by the First Amendment. *See Kent* v. *Dulles*, 357 U.S. 116, 129 (1958); *Winters* v. *New York*, 333 U.S. 507, 517-20 (1948).

Decisions of this Court, which have construed federal statutory provisions similar to Section 1464, have uniformly equated "indecent" and "obscene" in the Criminal Code.

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[37] *See* 47 U.S.C. § 312(a) (license revocation for violation of Section 1464); 47 U.S.C. § 312(b) (orders to cease and desist violation of Section 1464); 47 U.S.C. § 503(b) (monetary forfeiture for violation of Section 1464).

Section 1461 of the Criminal Code[38] prohibits the mailing of "[e]very obscene, lewd, lascivious, indecent, filthy or vile article." As long ago as 1957, this Court in *Roth* v. *United States*, 354 U.S. 476, indicated that "obscene" and "indecent" had the same meaning in Section 1461. Although it was argued in *Roth* that "these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere," the Court rejected the claim that Section 1461 was unconstitutional, holding that "[t]hese words, applied according to the proper standard for judging obscenity . . . give adequate warning of the conduct proscribed . . . ." *Id.* at 491.[39]

Section 1462 of the Criminal Code[40] prohibits the importation of "any obscene, lewd, lascivious, or filthy book, pamphlet, . . . or other material of indecent character." In *United States* v. *12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973), this Court suggested that it was "prepared to construe such terms [appearing in Section 1462] as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California*, [*supra*, 413 U.S. at 25]."

A similar result was reached in *Hamling* v. *United States*, 418 U.S. 87, 113-14 (1974), which, like *Roth*, involved Section 1461 of the Criminal Code. Relying on the language in *12 200-Ft. Reels*, the Court specifically construed the "generic" terms of Section 1461 to be limited to the constitutionally proscribable material defined in *Miller*. The Court found that " '[w]hile in common usage . . . words [such as "obscene," "lewd," and "indecent"] have different shades of meaning,' " statu-

[38] 18 U.S.C. § 1461.

[39] *Roth* also involved a California statute which, among other things, prohibited the keeping for sale or advertising "obscene or indecent" material.

[40] 18 U.S.C. § 1462.

torily those words reach only material which is obscene for constitutional purposes. *See Hamling* v. *United States*, *supra*, 418 U.S. at 112, quoting with approval, *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 482-84 (1962) (opinion of Harlan, J.).

The language of Section 1464, like the language of Section 1461 and Section 1462, prohibits certain material by the use of the adjectives "obscene" and "indecent." It is clear, therefore, that that language also should be construed as limited to material which is obscene as defined in *Miller*.

While the Commission in its Brief now concedes that "if [*12 200-Ft. Reels*] is controlling here, Pacifica's argument may be correct," the Commission suggests that *12 200-Ft. Reels* is not controlling because it "never addressed the broadcast context." (Br. at 29.) Since the rationale in *12 200-Ft. Reels* turned on the vagueness of the term "indecent" rather than on the nature of the medium in which the materials involved were presented, the Commission's distinction is one without a difference. The Commission does not demonstrate why "indecent" is not vague when applied to, for example, material which is broadcast rather than material which is read, and it could not do so.[41] It does not matter here that Section 1464 may have "the salutary purpose of protecting children." *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 689 (1968). "The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." *Id. See also Rabeck* v. *New York*, 391 U.S. 462 (1968). *12 200-Ft. Reels*, therefore, is controlling here, and "obscene" and "indecent" should be viewed identically for purposes of Section 1464.

[41] *See* discussion, pp. 17-18, *supra*, and pp. 33-39, *infra*.

This view is confirmed by the fact that there is nothing in the legislative history of Section 1464 which suggests the terms "indecent" and "obscene" are to be given different meanings. Indeed, to the extent the legislative history sheds any light on the intended scope of Section 1464, it indicates that the section should be construed as making criminal only obscene utterances. The only relevant passages in the legislative history indicate that "obscenity" was the concern of Congress.[42] The history also suggests that what is now Section 1464 was modeled on what is now Section 1461,[43] which had been part of the Criminal Code since 1909, and which was construed in *Roth* and *Hamling* as limited to obscenity. The Commission effectively recognized the limited scope of the present Section 1464 by submitting to Congress in 1976 a legislative proposal which would have repealed Section 1464 and added a new section to the Communications Act clearly defining "indecent" as distinct from "obscene."[44]

The Seventh Circuit has specifically addressed the question whether "obscene" and "indecent" have different meanings in Section 1464 and has concluded that the meanings are the same. *United States* v. *Simpson*, 561 F.2d 53 (7th Cir. 1977). The Commission's Brief merely makes passing reference to this case in two footnotes and an unexplained citation. (Br. at 7 n.4, 15 n.18, 26). In *Simpson*, however, after the most extensive analysis made by any decision on the question, the court squarely held that the terms "indecent" and "obscene" do not have

[42] *See Hearings on H.R. 7357 Before the House Comm. on the Merchant Marine & Fisheries*, 68th Cong., 1st Sess. 178-79 (1924).

[43] *See Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 40 (1926).

[44] *See* 122 Cong. Rec. S17101 (1976). In a memorandum of law accompanying its legislative proposal, the Commission, on the question whether "obscene" and "indecent" have different meanings in Section 1464, "acknowledge[d] that this is an area of considerable legal uncertainty." *Id.* at S17106.

separate meanings for the purposes of Section 1464. According to the court:

> " '[O]bscene' and 'indecent' in § 1464 are to be read as parts of a single proscription, applicable only if the challenged language appeals to prurient interest." 561 F.2d at 60.

B. Construing "Indecent" in Section 1464 To Reach Non-Obscene Speech Would Raise Substantial Constitutional Questions.

This Court's decisions in *12 200-Ft. Reels* and *Hamling* highlight a very fundamental reason requiring that "indecent" and "obscene" be construed identically in Section 1464. " '[W]hen the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' "[45] It is beyond dispute that serious constitutional questions would be raised if "obscene" and "indecent" are not construed identically in Section 1464.

1. If the Term "Indecent" in Section 1464 Is Not Limited to Obscenity, Substantial Questions of Unconstitutional Vagueness Would Be Raised.

12 200-Ft. Reels, *Hamling*, and *Roth* clearly imply that if "indecent" is not synonymous with "obscene" for purposes of Section 1464, serious questions of unconstitutional vagueness would be raised. "The general test of vagueness applies with particular force in review of laws dealing with speech." *Hynes* v. *Mayor and Council of Borough of Oradell*, 425 U.S. 610, 620 (1976). The deci-

[45] *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 368 (1971), quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). *See also Kent* v. *Dulles*, *supra*, 357 U.S. at 129-30, construing authority of Secretary of State to issue or withhold passports narrowly in order to avoid being "faced with important constitutional questions."

sions of this Court resolutely establish that where First Amendment interests are implicated, " 'legislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion.' " [46]

As Commissioner Robinson noted in his concurring opinion below, "[t]here is no significant jurisprudence explaining the meaning of [indecent]." *Order*, *supra*, 56 F.C.C.2d at 104 (App. 27). *See also id.* at 97 (App. 14). This is amply demonstrated by the numerous formulations for "indecent" suggested by the Commission in previous cases and in this case.[47]

Thus, there can be no question that, if the Commission is free to construe Section 1464 to go beyond obscenity, the statute leaves the Commission largely free to define

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[46] *Interstate Circuit* v. *Dallas*, *supra*, 390 U.S. at 684, *quoting Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684, 694 (1959) (Frankfurter, J., concurring). "[L]aws must provide explicit standards for those who apply them." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). *See also Hynes* v. *Mayor and Council of Borough of Oradell*, *supra*, 425 U.S. at 622; *Police Dep't of the City of Chicago* v. *Mosley*, 408 U.S. at 92, 97 (1972); *Kent* v. *Dulles*, *supra*, 357 U.S. at 129-30; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504-05 (1952).

"Where First Amendment interests are affected, a precise statute 'evincing a legislative judgment that certain specific conduct be . . . proscribed' . . . assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation." *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 109 n.5 (citations omitted). The Commission has had before Congress legislative proposals which would have amended Section 1464 to define the term "indecent." 122 Cong. Rec. S17101-S17111 (1976).

[47] The Commission asserts in its Brief that "at the time of the Commission's ruling on the Pacifica complaint, there was a growing body of regulatory caselaw establishing and applying standards of indecency . . . in broadcasting." (Br. at 14.) The Commission fails to note, however, just how contorted this supposed body of law was. *See* discussion, pp. 17-18, *supra*.

for itself what constitutes the material it may prohibit from being broadcast.[48]

The great constitutional difficulties created by determinations of indecency, which necessarily depend upon personal judgments of morality and taste,[49] were perhaps best articulated in Justice Harlan's opinion for the Court in *Cohen* v. *California*, 403 U.S. 15, 25 (1971). There, in discussing prohibitions on "offensive conduct" as applied to the use of one of the seven words prohibited by the Commission's *Order* as "indecent," the Court observed:

> "How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."

Whether or not Congress could "cleanse" the airwaves by regulating "indecent" broadcasts under specific and definite standards, a matter not here in issue, it is clear that judgments of indecency, like those of "offensive conduct," are matters about which "governmental officials cannot make principled distinctions." Allowing the Commission to regulate programming under a standard

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[48] A similar lack of guidance in *Interstate Circuit* v. *Dallas*, *supra*, 390 U.S. at 687, was held to invalidate a film classification ordinance whose standard was "sexual promiscuity".

[49] *Id.* at 676.

of indecency would impose substantial burdens, reaching far beyond any possible legitimate governmental interest.[50]

The vagueness of the existing standard in Section 1464 was clearly recognized in the Commission's 1976 legislative proposal to provide a new standard of indecency.[51] The Commission's legal memorandum accompanying the proposal noted that several cases support the proposition "that the term 'indecent' [in Section 1464] . . . is probably unconstitutionally vague and overbroad." [52]

The Commission's *Order* in this case fails to contribute in any way toward clarification of the statutory standard. While the Commission stated that its *Order* was issued "to clarify the standards" for judging "indecent" language,[53] in its *Reconsideration*, it noted that its *Order* "was issued in a specific factual context,[54] and it now argues before this Court that when a different set of facts is confronted, it can then determine "whether the principles announced in the declaratory order should be applied, modified or extended." (Br. at 43.) The Commission has thus repudiated any commitment to act according to set standards.

Moreover, the *Order* introduces other uncertainties. The *Order* suggests that "indecent" speech may be permitted "[w]hen the number of children in the audience is reduced to a minimum" and the speech "has serious literary, artistic, political or scientific value." [55] The *Order*, however, fails even to define "children." [56] Nor does it define the "minimum" permissible number of children in the audience or the relevant "audience"—whether of stations generally or the particular station or of a particular type of station. The vagueness of the *Order* is exacerbated by the Commission's failure to apply it to this case, despite the fact that the Carlin monologue was broadcast during a school day, after lunch hours, during a talk show over a noncommercial FM station whose appeal is such as not likely to attract child listeners. The *Order*, in this regard, merely observes that "children were undoubtedly in the audience." [57] At one point the *Order* suggests that there will be no exception for any broadcast since it states that "when children *may be* in the audience, [indecent language] cannot be redeemed by a claim that it has literary, artistic, political or scientific value." [58]

The *Order* also observes that the monologue was "prerecorded", "deliberately broadcast", and that the words used in it were "repeated over and over." [59] The *Order* then holds that the language "as broadcast" was indecent,[60] raising, but not answering, questions whether fore-

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[50] Moreover, the procedures according to which the Commission may enforce Section 1464 do not guarantee any prompt judicial resolution or review of Commission action with respect to programming it considers impermissibly offensive. *See, e.g., Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975); *Blount* v. *Rizzi*, 400 U.S. 410 (1971); *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

[51] *See* 122 Cong. Rec. S17101-S17111 (1976).

[52] *Id.* at S17104.

[53] 56 F.C.C.2d at 99 (App. 17)

[54] 59 F.C.C.2d at 893 (App. 43).

[55] 56 F.C.C.2d at 98 (App. 15-16).

[56] As Judge Tamm found below:

"[T]he *Order* is vague in that it fails to define children. Need a nineteen year old and a seven year old be protected from the same offensive language? The Supreme Court has held that in assessing the requisite capacity of individual choice the age of the minor is a significant factor. The *Order* does not even consider age as a factor, much less a significant one." 556 F.2d at 17 (App. 61) (footnote omitted).

[57] 56 F.C.C.2d at 99 (App. 17).

[58] *Id.* at 98 (App. 15). (Emphasis added.)

[59] *Id.* at 99 (App. 17).

[60] *Id.*

knowledge of broadcast content and repetition are part of the Commission's standard.

The Commission's reading of its *Order* in its Brief here only further confuses the picture. The Commission contends, for example, that no amount of "serious, literary, artistic, political or scientific value" may permit the broadcast of the words at issue here "where a substantial number of children are likely to be in the audience without parental supervision." (Br. at 36.) This raises the questions whether material which has social value can be broadcast when the number of children in the audience, although reduced to a minimum, is still "substantial" and whether such material can be broadcast where the number of children in the audience, although substantial, is likely to be supervised by adults.[61]

Further, while in the *Order* the Commission appeared to judge indecency by a national standard, in its Brief the Commission states that standards of indecency should permit parents to prohibit their children from hearing material "patently offensive by [their] community's contemporary standards." (Br. at 45.) It is even unclear, therefore, whether the Commission intends national or local community standards of offensiveness to be applied.

Finally, and perhaps most significantly, the *Order*, even as clarified on reconsideration, fails to provide any significant guidance as to what "indecent" material will be permitted in news and public affairs broadcasts. The Commission offers no guidance whatsoever as to what is

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[61] The Commission's observation is particularly bewildering in view of the fact that the only known child listener to WBAI's broadcast, the complainant's son, was under parental supervision at the time of the broadcast. In addition, there is no support for Commission consideration of the role of parental supervision. Moreover, no data were presented, for example, showing that parents do not generally supervise the viewing and listening of their children. *See* discussion and data, p. 9 & n.7, *supra*.

permissible in prerecorded news and public affairs broadcasts, and does not even make clear what would be permissible in a live broadcast of, for example, a demonstration. The heavy burdens imposed by the Commission's "standard" on broadcast journalism is readily apparent.

It is evident that there are no clearly articulated standards, either in the Commission's *Order* or in the Commission's reading of that *Order* before this Court, by which "indecency" may be determined. Delegating to the Commission the authority to regulate "indecency" in such circumstances grants the Commission "too wide a discretion," and the absence in Section 1464 "'of narrowly drawn, reasonable and definite standards for the [Commission] to follow' . . . is fatal." *Interstate Circuit* v. *Dallas, supra*, 390 U.S. at 690 (citations omitted).

2. *The Prohibition of Offensive Speech in Radio Communications Generally Would Raise the Most Serious Constitutional Questions.*

The Commission's *Order* also raises substantial constitutional questions apart from considerations of vagueness.

a. *Barring Non-Obscene Speech from the Broadcast Medium Cannot Be Justified on Grounds of Spectrum Scarcity.*

Numerous decisions of this Court have now firmly established the proposition that speech may not be prohibited on the ground that it is offensive to members of the community. In *Cohen* v. *California, supra*, this Court specifically held that wearing a jacket displaying a four-letter word in a court house could not be constitutionally prohibited. Similarly, in *Papish* v. *Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), the Court, *per curiam*, invalidated the expulsion of a student for distributing on campus a non-obscene publication assertedly containing "indecent" speech. According to the Court, "the mere dissemination of ideas—no matter how

offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Id.* at 670.[62]

The Commission contends, however, that the suppression here, which would clearly be impermissible in any other medium, is justified by the scarcity of space in the broadcast spectrum, relying on *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). However, the prohibition of Section 1464 is not limited to utterances over commercial radio and television. It extends to all utterances by means of radio communication, including, for example, communications over citizens' band radio, ship-to-shore radio, business radio and radio telephone. *See Gagliardo* v. *United States*, 366 F.2d 720 (9th Cir. 1966).[63] Thus, if construed as the Commission urges, Section 1464 would have the effect of criminalizing countless utterances of protected speech whose listening audi-

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[62] *See also, e.g., Spence* v. *Washington*, 418 U.S. 405 (1974); *Hess* v. *Indiana*, 414 U.S. 105 (1973); *Kois* v. *Wisconsin*, 408 U.S. 229 (1972).

[63] The language of Section 1464 derives nearly verbatim from § 29 of the Radio Act of 1927. According to that Act:

> "The expression 'radio communication' or 'radio communications' wherever used in this Act means any intelligence, message, signal, power, pictures, or communication of any nature transferred by electrical energy from one point to another without the aid of any wire connecting the points from and at which the electrical energy is sent or received and any system by means of which such transfer of energy is effected." Pub. L. No. 632, ch. 169, § 31, 44 Stat. 1173 (1927).

Before being transferred to Title 18 of the United States Code, the Section 29 prohibition on "indecent" and "obscene" broadcasts was carried over to Section 326 of the Communications Act. In that Act, "radio communication" was defined as:

> "the transmission by radio of writing signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(b).

ences at any time are probably less than a handful of individuals engaged in point to point communication. Such an approach appears to have little constitutional justification. But even if Section 1464 could somehow be limited to general purpose broadcasting, the construction urged by the Commission would still raise substantial constitutional questions.

In *Red Lion*, this Court held at most that spectrum scarcity justifies regulations in general purpose broadcasting which seek to assure that broadcasters do not exclude from the air discussion of controversial issues. Indeed, the court was careful to note in *Red Lion:*

> *"There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; . . . of government censorship of a particular program contrary to § 326;* or of the official government view dominating public broadcasting. *Such questions would raise more serious First Amendment issues."* *Id.* at 396. (Emphasis added.)[64]

Numerous decisions since *Red Lion*, in this Court and in the lower federal courts, have expressed grave reservations even about regulatory approaches which, while not banning speech in the broadcast medium, would substantially burden the broadcast of protected material. Most significantly, in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra*, this Court emphasized that, although broadcasting presents a unique context in which some limited governmental regulation is at times constitutionally proper, the need for such regula-

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[64] In light of *Red Lion's* limited scope, there is no reason for the Court in this case to approach the question of reconciling *Red Lion* with *Columbia Broadcasting System, Inc.* v. *Democratic National Comm., supra*, and *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). *See generally* B. Schmidt, FREEDOM OF THE PRESS VS. PUBLIC ACCESS (1976).

tion must always be balanced against the importance of permitting broadcasters to make their editorial choices freely.

The Court concluded that "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences" could be best served by a system in which editorial choices were left to the broadcaster:

> "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression." 412 U.S. at 124-25.[65]

Thus, the Court rejected the idea that the First Amendment and the existing broadcasting system could tolerate

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[65] Similarly, in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974), this Court, in a case involving a right of reply statute for newspapers, observed that:

> "[T]he Florida [right of reply] statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." (Footnote omitted.)

a scheme in which the government would determine the permissible content of material broadcast.

Several other cases have emphasized that the editorial role of the broadcaster is safeguarded by the First Amendment.[66] In *National Broadcasting Co.* v. *FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *vacated*, 516 F.2d 1180 (1975), *cert. denied sub nom. Accuracy in Media, Inc.* v. *National Broadcasting Co.*, 424 U.S. 910 (1976),[67] the court determined that the Commission had impermissibly substituted its judgment for that of a broadcaster in applying the Commission's fairness doctrine to a particular program. Judge Leventhal, writing for the court, expressed the controlling principle that:

> "The First Amendment is broadly staked on the view that our country and our people—rich in diversity of strains and viewpoint—is best served by widest latitude to the press [and] through a robust and uninhibited debate that is subject only to minimum controls necessary for the vitality of our democratic society." *Id.* at 1132.

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[66] The decision in *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom. Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000 (1972) (without opinion), is not to the contrary. The district court's decision essentially determined that a challenge to enforcement of a statute prohibiting cigarette advertising by electronic communication did not abridge First Amendment protections. Speaking prior to this Court's decisions in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), and *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the district court noted that "product advertising is less vigorously protected than other forms of speech" and that the statute "does not prohibit [broadcasters] from disseminating information about cigarettes, and, therefore, does not conflict with the exercise of their First Amendment rights." 333 F. Supp. at 584. Thus the court appears to have concluded that "Congress has the power to prohibit the advertising of cigarettes in any media." *Id.*

[67] The NBC case, despite having been vacated on other grounds, is often cited as the law of the circuit. *See, e.g., Straus Communications, Inc.* v. *FCC*, 530 F.2d 1001, 1008 (D.C. Cir. 1976).

Similarly, in *Straus Communications, Inc.* v. *FCC*, 530 F.2d 1001 (D.C. Cir. 1976), the court reversed a Commission determination that a licensee had violated the Commission's personal attack rules[68] and held that the reasons given by the licensee for not providing time were entitled to great deference under the First Amendment.

In *Accuracy in Media, Inc.* v. *FCC*, 521 F.2d 288 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), the court was confronted with the issue of whether the Public Broadcasting Act[69] would constitutionally require public broadcast licensees to meet specified standards of balance and objectivity with respect to individual programs. Fearful of the system of governmental oversight that would be created, the court interpreted the statute to avoid the constitutional problem, stating "[w]e will not presume that Congress meant to thrust upon us the substantial constitutional questions such a result would raise." *Id.* at 297.

Concerns similar to those of the court in *Accuracy in Media* were voiced more recently in *Action for Children's Television* v. *FCC*, 564 F.2d 458 (D.C. Cir. 1977). There the Commission had been requested to adopt rules relating to the sponsorship and the commercial content of children's programs. The Commission declined to adopt the proposed rules, noting that it was involved " 'in a sensitive First Amendment area' " and that " 'it is wise to avoid detailed governmental supervision of programming wherever possible'." *Id.* at 465. The court upheld the Commission's decision, observing that the Commission had not erred in concluding that First Amendment considerations "counselled a more cautious approach." *Id.* at 480.

The Commission argues, however, that its *Order* is necessary to prevent "widespread use of indecent words"

[68] 47 C.F.R. §§ 73.123, .300, .598, .679.

[69] 47 U.S.C. § 396(g)(1)(A).

on the public's airwave, which, because of spectrum scarcity, would usurp and thereby destroy the larger and effective use of radio in the public interest.[70] While the Commission's reasoning is not entirely clear, the Commission appears to suggest that if material such as that involved in this case is permitted, the broadcast of "indecent" language will dominate the broadcast spectrum to the exclusion of other material.

The Commission does not suggest, however, that a devotion of broadcast time to programming which some might find offensive has occurred since the reversal of its *Order* below. And prohibition of such broadcasts, no matter what their artistic or intellectual merit, can hardly be justified in the name of spectrum scarcity.[71]

Indeed, it is clear from the decision of the court of appeals below that the use of so-called "indecent" language in the broadcast medium may sometimes serve the public interest, particularly when the use of such material is part of a journalistic report in a news or public affairs broadcast.[72] And as this Court has noted, "indecent" language may play a vital role in the act of communication:

> "[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no re-

[70] Br. at 18 n.19. *See also Order, supra*, 56 F.C.C.2d at 100 (App. 18).

[71] Considerations analogous to spectrum scarcity have justified local regulations accommodating conflicting interests in use of the streets and parks. It is clear, however, that such considerations only permit regulations which are neutral with respect to the content of speech and which do not suppress certain types of speech because of its content. *See, e.g., Police Dep't of the City of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Cox* v. *Louisiana*, 379 U.S. 536 (1965).

[72] 556 F.2d at 14-15, 16 (App. 55-56, 58-59).

gard for the emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." *Cohen* v. *California*, *supra*, 403 U.S. at 26.

Thus, while broadcasting, like other media, may "present its own peculiar problems," *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952), the scarcity of the broadcast spectrum offers no justification for censorship of speech which might be found "offensive." As this Court has noted:

> "[T]he basic principles of freedom of speech and the press, like the First Amendment's command do not vary. Those principles . . . make freedom of expression the rule." *Id.*

b. *The Commission's Construction of Section 1464 Cannot Be Sustained on the Ground That It Prevents Unconsented Intrusions on Privacy.*

The Commission also suggests that its *Order* may be justified on the basis of considerations concerning the assertedly intrusive nature of radio broadcasting and the need to protect the unconsenting adult from any possibility that he will tune into a broadcast that he might find offensive. Even Judge Leventhal, the dissenting member of the court below, did not suggest that the Commission's *Order* could be justified on this ground.

There is very little support for the view that government may constitutionally protect an individual from intrusions on privacy based on considerations of program content. As this Court has clearly stated, "when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975). In

considering the circumstances in which such regulation is permissible, this Court has held that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen* v. *California*, *supra*, 403 U.S. at 21.

In only two cases has the Court considered the issue of government suppression of the content of speech based on considerations of privacy. First, in *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970), the Court upheld a statute permitting individuals to require that their names be removed from mailing lists for materials which they believed to be offensive. There, however, the suppression occurred at the instance of the private individual, not the government. Second, in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), the Court held that advertising space on a municipal bus did not constitute a public forum and that, therefore, a municipal policy prohibiting the sale of advertising space on its buses to candidates for political office but not others could be partially justified by the government's desire not to impose such material on captive passengers.

No decision of this Court has ever sustained the supression of speech on grounds of a "privacy" interest in situations where the individual may freely choose to reject the material being offered. In such circumstances the intrusion may be abruptly terminated and privacy protected by actions within the individual's control and "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" [73]

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[73] *Erznoznik* v. *City of Jacksonville*, *supra*, 422 U.S. at 210-11. *See also Spence* v. *Washington*, 418 U.S. 405, 412 (1974).

For example, in *Cohen* v. *California, supra*, this Court made it clear that "the fact that some unwilling 'listeners' in a public building [including women and children] may have been briefly exposed" to Cohen's jacket inscribed with a four-letter word could not justify suppression of speech. 403 U.S. at 22. According to the Court, "the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense," for "[t]hose in the [building] could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* at 21.

This ability to avoid "offensive" material is uniquely present in the broadcast medium. As this Court noted in *Rowan*, "[a] radio or television viewer may . . . twist the dial to cut off an offensive or boring communication and thus bar its entering his home." 397 U.S. at 737. Similarly, in *Lehman* this Court noted that unlike other intrusive modes of communication, "[t]he radio can be turned off." 418 U.S. at 302.[74]

Plainly the so-called "passive" nature of radio and television listening cannot justify governmental suppression of non-obscene speech.

c. *The Asserted Need To Protect Children Does Not Obviate the Serious Constitutional Issues.*

Ultimately the Commission bottoms the regulation of "indecent" speech on the need to protect children. There are serious doubts, however, as to whether the protection of children, laudible an interest as that may be, entirely

[74] *See also Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting): "One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes."

answers the constitutional objections to the restraints imposed by the Commission's *Order*.[75]

(i) The Commission's Construction Impermissibly Denies Protected Material to the Adult Population.

In arguing the need to keep what it believes to be offensive programming from children, the Commission all but totally ignores the rights of the adult population. This Court has clearly established that material may not be denied to the population generally even if its distribution to children could be prohibited. *Butler* v. *Michigan*, 352 U.S. 380 (1957). The broadcast media are no different in this regard.

The Commission, however, contends that the opportunity for supervision with respect to radio and television is considerably less than that possible for movies, books and magazines. (Br. at 34-35.) Nothing in the record supports this observation. Indeed, one study of

[75] Even if the statute could constitutionally be applied to situations in which indecent language was broadcast to an audience consisting largely of children—a situation which was by no means established to exist in this case—Section 1464 could still not stand under this Court's decision in *Cohen* v. *California, supra*. There, the state sought to justify its broad prohibition against offensive conduct as applied to the plaintiff's particular act of wearing an "indecently" worded jacket in a courthouse. The Court, however, held:

> "Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. See *Edwards* v. *South Carolina*, 372 U.S. 229, 236-237, and n.11 (1963). Cf. *Adderly* v. *Florida*, 385 U.S. 39 (1966). No fair reading of the phrase 'offensive conduct' can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created." 403 U.S. at 19. (footnote omitted).

child viewing indicates that the majority of viewing by children is supervised by adults.[76]

The asserted need to protect children provides no greater justification for extensive suppression of protected speech with respect to television and radio than it does for other modes of communication. Supervising child viewing and listening provides the same problems presented in attempting to control thousands of forms of printed material and movies available to children through countless sources. Books and magazines, purchased from newsstands, taken from the home, shared among friends, passed around the school yard or otherwise secured, have been and will always be readily available. The likelihood that children will hear protected speech that some find undesirable cannot be eliminated by removing that speech from radio and television any more than it can be eliminated by totally removing it from books, magazines and movies. *Cf. Butler* v. *Michigan, supra.* In this connection, the Court also may take note that the record album from which the Carlin monologue was broadcast is freely available to children, as well as adults, in stores throughout the country.

It is no answer to say that the interests of adults may be satisfied by channeling objectionable programming to late night hours when children are less likely to be in the audience. Restricting broadcasts to those times would have the effect of making them inaccessible to huge segments of the adult population because of either work hours or sleeping habits.[77]

While the Commission here relies on this Court's decision in *Young* v. *American Mini Theatres*, 427 U.S. 50

[76] Analysis done by A. C. Nielsen & Co. in February, 1974. In particular, the study shows that prime-time viewing constitutes 33% of the viewing done by children 2 to 11 years of age. During that time, parents are present with such children 70% of the time.

[77] *See* discussion and data, p. 9 & n.7, *supra.*

(1976),[78] the restraints on protected speech in *Mini Theatres* are not even remotely comparable to the extensive restraints effectively achieved by the Commission's *Order* in this case. In *Mini Theatres* the city ordinance before the Court required 1000 feet of separation between adult theaters and between such theaters and establishmnts such as bars and pool halls. A separation of 500 feet was required between such theaters and residential areas. The resulting restraint on protected expression was found to be minimal[79] and was found to be justified in part by "the city's interest in attempting to preserve the quality of urban life." *Id.* at 71. Mr. Justice Stevens' plurality opinion observed that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* at 71 n.35. Mr. Justice Powell in his pivotal concurring opinion similarly noted that there must be "full opportunity for everyone to receive the message." *Id.* at 76.[80]

By contrast, in this case—which does not involve sexually explicit material or land use—basic First Amendment concerns are directly implicated, for the Commission's *Order* specifically forbids the broadcast of protected

[78] (Br. at 28, 46.)

[79] According to Mr. Justice Stevens' plurality opinion:

> "There [was] no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained." 427 U.S. at 62.

[80] Like Mr. Justice Stevens, Mr. Justice Powell found "no indication that the application of the . . . Ordinance to adult theatres has the effect of suppressing production of or, to any significant degree, restricting access to adult movies." *Id.* at 77. In addition, Mr. Justice Powell's opinion indicates that the ordinance's concern was limited to the fact that adult theaters tended to cluster, resulting in the erosion of surrounding communities, and did not extend to any alleged effect resulting from the nature of sexually explicit expression per se.

speech. The Commission's *Order* fails clearly to permit "indecent" broadcasts, even when child audiences are minimal, by refusing to apply that exception to the case before it and by stating that "indecent" speech cannot be redeemed by intellectual value "when children *may be* in the audience," thus including each and every broadcast within its ambit.[81] Even if the Commission's *Order* had permitted "indecent" broadcasts when child audiences were minimal, such broadcasts would still, as a practical matter, not be conveniently accessible to the vast majority of viewers and listeners, "greatly restricting" lawful speech and denying a "full opportunity for everyone to receive the message."

The impact which the Commission's *Order* and *Reconsideration* will have on news and public affairs programming particularly highlights these concerns. Under the Commission's construction, audio and visual broadcasts of angry political demonstrations or even strong expressions of views in more structured dialogue would sometimes have to be censored, no matter how important the censored language might be to a proper understanding of the persons, viewpoints and events being reported. As the Court noted in *Cohen* v. *California, supra*, the emotive part of communication, which would be eliminated by such editing, is often as important, if not more important than the cognitive part. The Commission incorrectly concludes, therefore, that prohibiting the airing of certain words will not stifle robust, free debate.[82] "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." [83]

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[81] *Order, supra*, 56 F.C.C.2d at 98 (App. 15). (Emphasis added.)

[82] *Id.* at 99-100 (App. 18).

[83] *Cohen* v. *California, supra*, 403 U.S. at 26

The censorship imposed by the Commission's *Order* would not only be inimical to accurate and insightful news reporting and presentation of public affairs but would also, in the long run, have its greatest impact on broadcasts concerning highly sensitive issues and on the broadcast of news and public affairs involving those persons who, for whatever reason—cultural impoverishment, social disaffection or the evolution of community mores—regularly and publicly use language which might be considered inappropriate for public speech. Undeniably, many such persons are significantly involved in the nation's political and social concerns. Protection for discourse on these concerns is within the core of the First Amendment. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

It will not do to allow news and public affairs broadcasts containing the language proscribed by the Commission during the late night hours. As noted, such a constraint would make listening or viewing impossible or impractical for many persons who rely upon the regularly scheduled radio and television news and public affairs programming broadcast by local stations and the networks in the morning, afternoon or early evening.

Moreover, relegating "sensitive" news reports to late evening hours is impractical because news has an element of timeliness which will often be lost if it must await broadcast at some later time. This problem with the Commission's ruling is not helped by the exception for live news broadcasts purportedly created by the Commission in its *Reconsideration*. News may be timely even if its coverage is not live. Moreover, the Commission's admonition that sanctions may still attach for live broadcasts which lack "sensitivity to the community's . . . tastes" further deters news broadcasts containing possibly "offensive" language.[84]

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[84] 59 F.C.C.2d at 893 n.1 (App. 43 n.1).

(ii) The Commission's Construction Would Unconstitutionally Ban the Broadcast of Protected Material to Children.

Even if it were constitutional to restrict material in the broadcast medium because of the access of children to such material, the Commission's *Order* here surely sweeps too broadly in describing the material that must be purged from the airwaves lest it be heard by children. Just as children cannot be prevented from viewing all forms of nudity, *Erznoznik* v. *City of Jacksonville*, *supra*, 422 U.S. at 213, so children cannot be prevented from hearing every use of the words involved here, if they can be prevented from hearing such words at all.[85]

The Commission claims in its Brief that the court below incorrectly treated its *Order* "as though it prohibited any TV or radio broadcast which included one of the seven words." (Br. at 41.) That treatment, however, was an indisputably fair and proper reading of the

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[85] Commendable as may be the concern about the influence of television on the young, as Judge Bazelon noted below, the First Amendment and its history strongly caution against justifying regulation of the broadcast media on the basis of their influence:

> "The impact of television and radio has grown at an astonishing rate, and broadcasting promises to become by far the most influential medium of communications in our society. As its power continues to grow, preservation of free speech will hinge largely on zealously protecting broadcasting from censorship. As Chief Justice Warren once observed, the impact of a particular medium constitutes no basis for subjecting that medium to greater suppression:
>
> > This is the traditional argument made in the censor's behalf; this is the argument advanced against newspapers at the time of the invention of the printing press. The argument was ultimately rejected in England, and has consistently been held to be contrary to our Constitution. No compelling reason has been predicated for accepting the contention now.
>
> *Times Film Corp.* v. *City of Chicago*, 365 U.S. 43, 77 (1969) (Warren, C.J., dissenting)." 556 F.2d at 30 (App. 91) (footnote omitted).

Order which concerned itself with the "language" and "words" used in the monologue.[86]

As the court below found, the *Order*, by banning the use of certain words, without any consideration of literary, artistic, or intellectual content, would preclude the broadcast of many of the great works of literature:

> "The Commission's action proscribes the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*." 556 F.2d at 14 (App. 54).
>
> "In addition, works of Auden, Becket, Lord Byron, Chaucer, Fielding, Greene, Hemingway, Joyce, Knowles, Lawrence, Orwell, Scott, Swift and the Nixon tapes, would not be allowed to air." *Id.* at 17 n.19 (App. 60 n.19).

As we have noted, it would also prevent the presentation of news and public affairs programming.

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[86] In any event, the propriety of this treatment is established by the Commission's own reading of its *Order*. The Commission states in its Brief that the "narrower" issue presented here is whether "the Commission reasonably concluded that certain *words* . . . were indecent 'as broadcast.'" (Br. at 26, emphasis added.) It then asserts that the characteristic of the words "as broadcast" was defined by certain "undisputed factors." (*Id.*) The first factor, according to the Commission, is that "the *words* broadcast depicted sexual and excretory activities and organs in a manner patently offensive . . . ." (*Id.*, emphasis added.)

The remaining factors—"broadcast 'in the early afternoon,'" "prerecorded," "repeated over and over," and "deliberately broadcast"—do little to alter the conclusion that the words per se were "indecent." Since it would also be true in a great many, if not most, instances that the words would be repeated in a deliberate and prerecorded broadcast, these considerations would not significantly alter the *Order's* ban of the seven words.

There is no dispute that the broadcast of material of serious intellectual content and news and public affairs programming is protected by the First Amendment. "[O]nly in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials" to children. *Erznoznik* v. *City of Jacksonville*, *supra*, 422 U.S. at 213. Those circumstances were not permissibly defined by the Commission's *Order*.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

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